[Cite as *State v. Wesemann*, 2009-Ohio-5168.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO Appellee v. WILLIAM H. WESEMANN Appellant	C. A. No. 24588 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 08 06 1914

DECISION AND JOURNAL ENTRY

Dated: September 30, 2009

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} A jury convicted William Wesemann of burglary, criminal damaging or endangering, and two counts of domestic violence. He has appealed, arguing that the trial court incorrectly denied his motion for acquittal under Rule 29 of the Ohio Rules of Criminal Procedure. Because the trial court made a mistake regarding post-release control at Mr. Wesemann's sentencing hearing and in its sentencing entry, the sentencing entry is void. This Court, therefore, exercises its inherent power to vacate the void judgment and remands for a new sentencing hearing.

POST-RELEASE CONTROL

{¶2} Mr. Wesemann's burglary conviction is a felony of the second degree. His other convictions include a fourth-degree felony and two misdemeanors. For the burglary conviction,

the trial court sentenced him to three years in the custody of the Ohio Department of Rehabilitation and Correction and to five years of post-release control.

{¶3} Under Section 2967.28(B) of the Ohio Revised Code "[e]ach sentence to a prison term for a felony of the . . . second degree . . . shall include a requirement that the offender be subject to a period of post-release control imposed by the parole board after the offender's release from imprisonment." For a felony of the second degree that is not a felony sex offense, the period is three years. R.C. 2967.28(B)(2). Under Section 2929.14(F)(1), "[i]f a court imposes a prison term . . . for a felony of the second degree, . . . it shall include in the sentence a requirement that the offender be subject to a period of post-release control after [his] release from imprisonment . . . ." In addition, Section 2929.19(B)(3)(c) provides that, "if the sentencing court determines . . . that a prison term is necessary or required, [it] shall . . . [n]otify the offender that [he] will be supervised under section 2967.28 of the Revised Code after [he] leaves prison if [he] is being sentenced for a felony of the . . . second degree . . . ."

{¶4} At the sentencing hearing, the trial court told Mr. Wesemann that it was imposing on him five years of post-release control. Similarly, in its journal entry, it wrote that, "[a]fter release from prison, the Defendant is ordered subject to post-release control of 5 years, as provided by law."

{¶5} In *State v. Simpkins*, 117 Ohio St. 3d 420, 2008-Ohio-1197, the Ohio Supreme Court held that, "[i]n cases in which a defendant is convicted of, or pleads guilty to, an offense for which postrelease control is required but not properly included in the sentence, the sentence is void . . . ." *Id.* at syllabus. The Supreme Court reasoned that "no court has the authority to substitute a different sentence for that which is required by law." *Id.* at ¶20. It concluded that "a

sentence that does not conform to statutory mandates requiring the imposition of postrelease control is a nullity and void [and] must be vacated." *Id.* at ¶22.

{¶6} In *State v. Bedford*, 9th Dist. No. 24431, 2009-Ohio-3972, at ¶11, this Court held that, if "[a] journal entry is void because it included a mistake regarding post-release control . . . there is no final, appealable order." Accordingly, this Court does not have jurisdiction to consider the merits of Mr. Wesemann's appeal. *Id.* at ¶14. It does have limited inherent authority, however, to recognize that the journal entry is a nullity and vacate the void judgment. *Id.* at ¶12 (quoting *Van DeRyt v. Van DeRyt*, 6 Ohio St. 2d 31, 36 (1966)).

CONCLUSION

{¶7} The trial court's journal entry included a mistake regarding post-release control. It, therefore, is void. This Court exercises its inherent power to vacate the journal entry and remands this matter to the trial court for a new sentencing hearing.

Judgment vacated,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is

instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellee.

CLAIR E. DICKINSON
FOR THE COURT

BELFANCE, J.
CONCURS

CARR, J.
DISSENTS, SAYING:

{¶8} I respectfully dissent.

{¶9} In a recent line of cases, the Supreme Court of Ohio has consistently held that sentences which fail to impose mandatory post-release control are void. See *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577, at ¶8; *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, syllabus; *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, syllabus. In *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, at ¶24, the high court noted that the General Assembly's goal of achieving "truth in sentencing" resulted in a felony-sentencing law in 1996 that was intended to ensure that all persons with an interest in a sentencing decision would know exactly the sentence a defendant is to receive upon conviction for committing a felony. The *Cruzado* court went on to note that "[c]onfidence in and respect for the criminal-justice system flow from a belief that courts and officers of the courts perform their duties pursuant to established law." Id.

{¶10} The debate regarding whether sentences which fail to comply with statutory requirements are void or voidable is complex and well-documented. See, e.g., *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-197; *State v. Holcomb*, 9th Dist. No. 24287, 2009-Ohio-3187.

Although I am uncomfortable with the existing approach adopted by this Court, I will continue to support the framework outlined in the majority opinion on the basis of stare decisis and in the interest of consistency for the reasons I enunciated in *Holcomb*, supra, (Carr, J., concurring). However, I am unwilling to extend that analysis to defendants who are sentenced after July 11, 2006.

{¶11} In his assignment of error, Wesemann argues the trial court committed reversible error when it denied his motion for a judgment of acquittal under Crim.R. 29. While Wesemann does not specifically challenge whether the trial court properly put him on notice of post-release control, the majority holds that his sentence is void on the basis that it does not satisfy statutory requirements. This case presents an example of how a sentence may be considered void even though the trial court's actions did not run afoul of the statutory framework. As the majority noted, the current version of R.C. 2967.28(B) states that each sentence to a prison term for a felony of the second degree shall include a requirement that the offender be subject to a period of post-release control imposed by the parole board after the offender is released from prison. However, the statute also states:

> "If a court imposes a sentence including a prison term of a type described in this division on or after July 11, 2006, the failure of a sentencing court to notify the offender pursuant to division (B)(3)(c) of section 2929.19 of the Revised Code of this requirement or to include in the judgment of conviction entered on the journal a statement that the offender's sentence includes this requirement does not negate, limit, or otherwise affect the mandatory period of supervision that is required for the offender under this division." Id.

The current version of R.C. 2929.19(B)(3)(c) contains parallel language to R.C. 2967.28(B) regarding the imposition of post-release control in situations where an offender was not given notice at the sentencing hearing or in the journal entry. A jury found Wesemann guilty of burglary, criminal damaging or endangering, and two counts of domestic violence on December

18, 2008. Subsequently, Wesemann was sentenced under the current statutory framework on January 9, 2009.

{¶12} In *Woods v. Telb* (2000), 89 Ohio St.3d 504, 512, the Supreme Court held that the former version of Ohio's post-release control statute did not violate the separation of powers doctrine but went on to emphasize that "post-release control is part of the original judicially imposed sentence." In *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126, at ¶18, the Supreme Court held that under the former version of Ohio's post-release control statute, the Adult Parole Authority was not authorized to impose post-release control on a defendant when the trial court did not inform the defendant about the mandatory term of post-release control at the sentencing hearing and had failed to incorporate post-release control in its sentencing entry. See, also, *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, ¶9. Unlike the version of the statute which was at issue in *Woods* and *Hernandez*, the amended post-release control statute, which became effective in 2006, empowers the APA to impose mandatory post-release control regardless of whether the trial court gave the defendant notice of the mandatory term of post-release control. R.C. 2967.28(B).

{¶13} The recent line of cases which have consistently held that sentences which fail to impose a mandatory term of post-release control are void have been premised on the fundamental understanding that trial courts do not have the authority to impose sentences which do not comply with the law. *Boswell* at ¶8; *Simpkins* at ¶20. Under the current language of R.C. 2967.28(B), post-release control may be imposed when the trial court does not put the offender on notice at the sentencing hearing or by journal entry. Because confidence in and respect for the criminal justice system flow from a belief that courts and officers of courts perform their duties pursuant to established law, the current disconnect between the approach adopted by Ohio

appellate courts and the language in R.C. 2967.28(B) must be reconciled. In this case, I would address Wesemann's assignment of error on the merits.

APPEARANCES:

RHONDA L. KOTNIK, attorney at law, for appellant.

SHERRI BEVAN WALSH, prosecuting attorney, and HEAVEN R. DIMARTINO, assistant prosecuting attorney, for appellee.